PPP Loans and Affiliate Businesses - Be Careful

Dear World Floor Covering Association Member:

With Congress passing the "Paycheck Protection Program and Health Care Enhancement Act" yesterday, an additional $321 billion will be made available for Payroll Protection Program (PPP) loans for businesses with less than 500 employees. The loans are forgivable with certain limits. In addition, the Small Business Administration (SBA), which oversees PPP loans, last week issued regulations that regarding how to account for affiliates of a company. These rules could impact flooring dealers.

Some flooring dealers may set up separate businesses for certain aspects of their business. For example, there could be separate company for the residential business and another for commercial work. Similarly, a company may set up its warehouse as a separate company or establish a company to own property that is rented to the flooring dealer.

Under SBA's rules, a business must count both its employees and those of all of its affiliates. to determine if it is eligibility for a PPP loan If all the employees taken together is over 500, then the business is not likely to be eligible for a PPP loan. The confusion arises on whether to including the salaries of the employees for all affiliates in calculating payroll cost, and whether there is any impact on an affiliate getting its own PPP loan.

The simple answer is a business can include only the payroll cost of its employees, not the employees of its affiliates. The good news is that each affiliate can apply for its own PPP loan. The bad news is that the law and the SBA's rules do not make that very clear and flooring dealer may run into issue when applying for a PPP loan for affiliates.

In determining whether an affiliation exists, the test is whether one business controls or has the power to control another business. Control arises through ownership, management, or other relationships between the businesses.

- *Affiliation through ownership.* A business is an affiliate of another company that owns or has the power to control more than 50 percent of the concern's voting equity. Control can occur through outright ownership or the right to vote the equity.

- *Affiliation though negative control.* Affiliation can also arise from negative controls, such as where a minority shareholder or LLC member has the ability to prevent a quorum or block action of a business. If, however, a minority shareholder or LLC member gives up those rights, the minority shareholder/member would not be an affiliate.

- *Affiliation based on management.* Affiliation arises where the CEO, President, senior officers, partners, or managing members of the business also control the management of one or more other concerns. It also arises where an individual or business controls the board of the borrower and the board of another business.

- *Affiliation based on identity of interest.* Two or more individuals or businesses with an identity of interest may be affiliates. Individuals or businesses with substantially identical business or economic interests may be affiliates. For example, common investments, and economic dependence can create an affiliation. The SBA has previously held such identity of interest often exists between a business owner and their spouse, children, parents and in-laws.

If your company is a parent or a subsidiary of another company, or if its management controls other entities, then your company likely has affiliates. This means that in addition to counting the number of employees in your business, you also need to count the employees of each affiliate to see if you are eligible for a PPP loan. These affiliate employees, however, are not included in calculating your payroll cost. Accordingly, an affiliated business can apply of its own PPP loan.

With the rapid pace at which laws, rules and orders are being issued, WFCA is working to keep members informed and updated regarding their opportunities and obligations during the COVID-19 crisis. The Association will also continue to provide important information that may impact members. In the meantime, please feel free to send your concerns or questions directly to **jeffw@jkingesq.com** and **mperkins@lobbyit.com**.

Notice: *The information contained in this update is abridged from legislation, court decisions, and administrative rulings, and should not be construed as legal advice or opinion, and is not a substitute for the advice of counsel.*

Together,

The WFCA Team

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